In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 470

FRANK GIANATASIO, JR., PETITIONER

v.

FIRST LIEUTENANT EAMONN M. WHYTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. B) is reported at 426 F. 2d 908.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1970. The petition for a writ of certiorari was filed on July 29, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an enlisted member of the Connecticut Army National Guard, was subject to

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activation pursuant to 10 U.S.C. (Supp. V) 673a for unsatisfactory participation in drills.

2. Whether the courts should review and overturn the determination of petitioner's superior officer that he did not present a neat appearance at National Guard drills.

STATEMENT

Petitioner enlisted in the Connecticut Army National Guard on July 14, 1965.[1] At that time he entered into an enlistment agreement which provided in part as follows (Pet. App. 32):

> If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

On eleven occasions between January 1969 and March 1969, petitioner was cited by his commanding officer for "unsatisfactory participation" in unit drills by reason of an alleged failure to comply with Army Regulation 135.91 5(d)(2) concerning "neat appearance" because of his long hair. On each such occasion, petitioner was physically present at his unit drills.

By undated letter addressed "To Whom It May Concern" (Pet. App. 33–34), and received by petitioner's commanding officer, petitioner's employer explained the need for petitioner to have "long hair"

[1] Unless otherwise indicated, the statement of facts is based on the stipulation of facts contained in the briefs of both parties filed in the court of appeals and presently on file with the Clerk of this Court.

in his civilian employment and requested that he be excused from compliance with appearance regulations of the National Guard.

On April 24, 1969, petitioner appeared before the State Adjutant General, and, as a result of that appearance, was given a further opportunity to comply with the relevant regulations pertaining to appearance. Thereafter, on two occasions he appeared before his commanding officer who determined that the length of his hair was still unsatisfactory. Petitioner was then informed that his unit was requesting that he be ordered to active duty for a period of 24 months, less time actually served on active duty, by reason of his allegedly "unsatisfactory participation."

On July 1, 1969, petitioner was ordered to report for active duty on August 7, 1969; he appealed and was granted a stay of orders for a period of thirty days. His appeal was disapproved, and on August 27, 1969, he was ordered to report for active duty on September 10, 1969. Petitioner commenced this action for a declaratory judgment and an injunction on September 5, 1969. The district court (Pet. App. 25–29) granted summary judgment against petitioner, and the court of appeals affirmed (Pet. App. 17–24).

ARGUMENT

The decision below is not in conflict with decisions in the other circuits and presents no question which warrants further review of the petition.

1. The courts below properly rejected petitioner's contention that his activation under 10 U.S.C. 673a

violated the terms of his enlistment agreement. This is essentially the same argument that was made and rejected in *Winters* v. *United States*, 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, 393 U.S. 896; *Fox* v. *Brown*, 402 F. 2d 837 (C.A. 2), certiorari denied, 394 U.S. 938; *Karpinski* v. *Resor*, 419 F. 2d 531 (C.A. 3); *Schwartz* v. *Franklin*, 412 F. 2d 736 (C.A. 9); *Winters* v. *United States*, 412 F. 2d 140 (C.A. 9), certiorari denied, 396 U.S. 920.

When petitioner enlisted in the Connecticut Army National Guard he agreed that on failure to perform satisfactorily he could be ordered to active duty for a period of 45 days or be reported to Selective Service for immediate induction. At the time of his enlistment (as at present), the law provided (50 U.S.C. App. 456(c)(2)(D)) that a reservist whose performance of reserve obligations was unsatisfactory would be subject to induction into the Armed Forces on a priority basis by his local draft board. Such induction could be at any time during the six year enlistment; he could be required to serve two full years, with no credit for prior active duty.

Subsequent to petitioner's enlistment 10 U.S.C. 673a became effective, providing additionally that the President may directly activate, for a period of two years less time already spent on active duty, any Ready Reservist who is not "participating satisfactorily". In practical effect (except for the credit for prior service) this provision differs little from the law as it was when petitioner enlisted; in both cases

the reservist is subject to active duty under identical circumstances.[2] See *Winters* v. *United States, supra,* 281 F. Supp. at 292. Thus, direct activation in this case was not outside the intended scope of the enlistment agreement.

This Court's decisions in *Breen* v. *Selective Service Board,* 396 U.S. 460, and *Gutknecht* v. *United States,* 396 U.S. 295, are inapposite here. Those decisions involved the question whether the Selective Service statute provided necessary authorization for priority induction of delinquent registrants. In the instant case, however, such statutory authorization is not at issue; Congress, under its broad constitutional powers to raise and support armies (Art. 1, Sec. 8), has enacted specific legislation for the activation of reservists who unsatisfactorily perform their duties.

2. The contention that activation unjustly deprived petitioner of his right to a livelihood in civilian life is not persuasive. Congress has determined that all young men are liable for military service and, in order to fulfill his military duty, petitioner voluntarily enlisted in the National Guard. It is, of course, well known that the military insists that its members maintain a certain uniform appearance and petitioner assumed the burden

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[2] Activation by Selective Service would give petitioner no greater procedural rights than he has under 10 U.S.C. 673a. Under 50 U.S.C. App. 456(c)(2)(D) the reservist is ordered to report for priority induction "regardless of the class in which he is classified and without changing his classification." 32 C.F.R. 1631.8. Accordingly, claims to exempt or deferred status would not be entertained by his local board in these circumstances.

imposed by this requirement when he voluntarily enlisted. His activation for failing to continue to meet this requirement was not unjustified. See *Raderman* v. *Kaine*, 411 F. 2d 1102 (C.A. 2); *Byrne* v. *Resor*, 412 F. 2d 774 (C.A. 3); Army Regulation 135–91; Connecticut State Regulation Number 26 (Pet. App. 14). From his enlistment in the National Guard, the petitioner derived clear benefits. He should be held to the burdens which are inherent in military service. Nor should federal courts assume the task of reviewing the military's determination as to what constitutes the neat appearance required of enlisted men. See *Orloff* v. *Willoughby*, 345 U.S. 83.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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*As both courts below noted, petitioner, by the purchase of a wig, could have easily conformed his military obligation with the asserted needs of his civilian occupation (Pet. App. 24, 29).

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